No. 981

In the Supreme Court of the United States

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A. B. FRANK COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

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OPINION BELOW

The opinion of the Court of Claims (R. 16–25) is reported in 62 F. Supp. 860.

JURISDICTION

The judgment of the Court of Claims was entered on November 5, 1945 (R. 25). A motion for a new trial was filed on January 3, 1946, and was overruled on February 4, 1946 (R. 25). The petition for a writ of certiorari was filed on March 21, 1946 (R. 25). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Where taxpayer filed a claim for refund of floor stocks taxes but failed and refused to submit any substantial evidence upon which the Commissioner could determine whether or not it bore the burden of the tax, may the taxpayer maintain a suit in the Court of Claims for the recovery of such tax?

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations are set forth in the Appendix, *infra,* pp. 10–15.

STATEMENT

This is a suit to recover $36,735.16, paid as floor stocks tax during 1933, pursuant to the provisions of the Agricultural Adjustment Act of May 12, 1933, the taxing provisions of which were held unconstitutional in *United States* v. *Butler,* 297 U. S. 1 (R. 8–9). This suit is based on an amended claim for refund filed on April 10, 1939. This claim was filed after the Commissioner had rejected a claim filed on June 29, 1935, and another claim filed on June 30, 1937, the rejections being based on the ground that taxpayer had failed to submit evidence as to whether it bore the burden of the tax. (R. 9–11.) The amended claim of April 10, 1939, was accompanied by a seven-page letter signed by a certified public accountant. The letter was attached to the claim as a part of

it, and was expressly included in and under the signature and oath of taxpayer by its president who signed and verified the claim. The Commissioner associated that statement and computation with the amended claim, considered and treated the document as a part thereof throughout, and it will hereinafter be referred to as a part of the claim. (R. 11.)

The accountant's letter, above referred to, set forth a schedule, purporting to be based on net sales and gross profits taken from the taxpayer's books and records, and showing average margin computations over certain periods of time. It showed, among other things, that the average margin before the tax period was 19.25%, during the tax period 22.46%, and following the tax period 18.67%. It was stated further that this ~~maximum~~ major increase during the tax period was in part due to an increase in unit sales prices which started early in June 1933 and continued in an upward trend until the later part of the year. (R. 11–12.)

After receipt of the claim of April 10, 1939, the Commissioner advised the taxpayer that the marginal data submitted in support of the claim did not afford a sufficient basis for him to determine whether and to what extent the burden of the floor stocks tax was borne by the taxpayer, and requested that additional evidence be submitted, including, among other things, a statement showing the prices charged before and after

the effective date of the tax, a detailed explanation of the method used in recording new merchandise, and a detailed explanation as to the manner in which supervision was maintained over departmental inventories (R. 13).

No evidence was submitted to the Commissioner in accordance with this request and no evidence in addition to that included in the refund claim of April 10, 1939, was ever submitted to the Commissioner by the taxpayer. The claim for refund was finally rejected by the Commissioner on September 15, 1939, and this suit was instituted in the Court of Claims on September 11, 1941. (R. 1, 13–15.)

After the filing of the petition herein, taxpayer sought to prove its claim for the refund of the floor stocks tax from its books, records, audit schedules, invoices, and other data showing the prices prevailing both before and after August 1, 1933, and by the testimony of witnesses. Except to the extent shown in the claim for refund filed on April 10, 1939, none of this evidence was ever presented or offered to the Commissioner when he was considering the claim for refund and at which time it either was available or could as readily have been obtained and submitted as after this suit was filed. (R. 15.)

On April 22, 1944, the Government filed a plea in bar upon the ground that the taxpayer had no right of action against the United States because

no evidence was ever submitted in support of any claim for refund as expressly required by the applicable provisions of Section 903 of the Revenue Act of 1936 (R. 3–4).

The Court of Claims sustained the Government's plea in bar and dismissed the petition (R. 25).

ARGUMENT

The holding of the court below, that the data submitted with taxpayer's claim for refund did not meet the requirements of the statute (Sec. 903, Revenue Act of 1936, Appendix, *infra,* p 12) and the regulations (Art. 202, Treasury Regulations 96, Appendix, *infra,* p. 14), is correct and in accordance with the decisions of this Court and of a number of Circuit Courts of Appeals. Since the taxpayer did not submit evidence to enable the Commissioner of Internal Revenue to determine the question of whether it bore the burden of the tax, it is not entitled to any recovery in a suit brought in court. The recent decision of this Court in the case of *Angelus Milling Co.* v. *Commissioner,* 325 U. S. 293, plainly indicates that a failure to comply with requirements of the applicable statutes and regulations governing claims for refund deprives a court of jurisdiction over a suit brought after the claim is denied. Other decisions dealing with the statute and regulations herein involved and to the same effect are *Weiss* v. *United States,* 135 F. 2d 889

(C. C. A. 7th), *Jaubert Bros.* v. *United States,* 141 F. 2d 206 (C. C. A. 5th), and *Cudahy Packing Company* v. *United States,* 152 F. 2d 831 (C. C. A. 7th), pending on petition for certiorari, No. 1114; this Term. In the *Weiss* case, the court stated that the Commissioner must be afforded an opportunity to pass upon the merits of a claim for refund of compensating taxes as a prerequisite to the claimant's right to a court hearing, and sustained the dismissal of the action.[1] See also *Samara* v. *United States,* 129 F. 2d 594 (C. C. A. 2d), certiorari denied, 317 U. S. 686; and *Louis F. Hall & Co.* v. *United States,* 148 F. 2d 274 (C. C. A. 2d), certiorari denied, No. 167, this Term, in which the same result was reached although the court did not dismiss the complaint for lack of jurisdiction but, rather, thought that it should be dismissed on the merits or that a motion for summary judgment for the Government should be granted. Under the *Angelus* decision, the plea in bar was properly sustained in the instant case; and the *Samara* and *Hall* decisions do not aid the taxpayer.

This is not a case in which the claimant was denied the right to establish, in a court proceeding, the fact that it had borne the burden of the

[1] In this connection, petitioner, in relying on the provisions of Section 902, Revenue Act of 1936 (Appendix *infra*, pp. 11–12), as requiring that proof that it bore the burden of the tax must satisfy either the Commissioner *or* the court, overlooks the provision of Section 903, requiring the filing of a claim and the setting forth of evidence relied upon under oath as a prerequisite to bringing suit under Section 902.

tax because it had failed to establish this fact to the satisfaction of the Commissioner. It is, rather, a case in which the original claim was defective in that it did not contain any substantial supporting evidence. The Government's plea in bar specifically stated that the petitioner had no right of action because no evidence was submitted in support of its claim (R. 3–4), and the gist of the opinion of the court below is that since no adequate claim was filed with the Commissioner, the suit cannot be maintained. The claim, together with the attached statement which was treated throughout as a part of the claim (R. 11),[2] afforded to the Commissioner no opportunity whatever to exercise the administrative judgment Congress plainly contemplated (R. 23). For this reason, the claim was fatally defective.

The decision below, therefore, is not in conflict with the decisions of this Court in *United States* v. *Jefferson Electric Co.,* 291 U. S. 386; and *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. This Court, in the *Jefferson Electric Co.* case, ex-

[2] The only thing even in the nature of evidence ever submitted to the Commissioner by the taxpayer was a statement purporting to be based on petitioner's records and showing certain marginal computations (R. 11). Petitioner did not at any time furnish a statement of comparative selling prices as expressly requested by the Commissioner and did not explain its failure to do so (R. 10, 14). Margin computations give rise to no presumption in the case of floor stocks taxes (cf. Section 907, 7 U. S. C. 649, with respect to processing taxes) and, as the court below held, no real evidence was submitted.

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pressly recognized the necessity of a preliminary appeal to the Commissioner and the presentation of a proper claim for refund. 291 U. S. at 398. It pointed out that the right to a refund of taxes was limited by the requirement that the taxpayer show that it had borne the burden of the tax, whether the proceeding was before the Commissioner or in a suit (p. 395) "brought after an application to him has been unavailing." The decision of the court below is clearly in accord with that holding.

There is no conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Bethlehem Baking Co.* v. *United States*, 129 F. 2d 490. In that case, the taxpayer submitted substantial evidence to the Commissioner and the court expressly stated (p. 493) that it was "the duty of a claimant to present a formal claim and to endeavor by sufficient proof to satisfy the Commissioner as to its merit," but that after he had done so he was not barred from presenting other evidence in court. The decision of the court below is, in fact, clearly in accord with the decision in the *Bethlehem Baking* case.[3]

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[3] Cf. R. 24, where the court states that if the Commissioner had rejected the claim because it had not been established to his satisfaction that plaintiff was entitled to a refund—

> plaintiff would not be barred here from submitting the same and further additional evidence * * * to establish to the satisfaction of the court the allegations of the claim and its right under the statute to the refund.

CONCLUSION

The court below concluded, upon the record in this case, that the petitioner, having failed and refused to submit any evidence to the Commissioner in support of its claim for refund, was barred from submitting in court the evidence which was available and which could and should as readily have been offered to the Commissioner. This decision is correct, there is no conflict of decisions, and no other basis for certiorari. The petition should be denied.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.
SEWALL KEY,
Acting Assistant Attorney General.
HELEN R. CARLOSS,
ELIZABETH B. DAVIS,
Special Assistants to the Attorney General.

MAY 1946.

APPENDIX

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended:

> SEC. 9 (a). To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * *
> (7 U. S. C. 609.)

> SEC. 16 (a). Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:
>
> (1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed

if the processing had occurred on such date. * * *

(7 U. S. C. 616.)

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sec. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be

reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

(7 U. S. C. 644.)

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C. 645.)

SEC. 904. STATUTE OF LIMITATIONS.

Notwithstanding any other provision of law, no suit or proceeding, whether brought

before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought. (7 U. S. C. 646.)

SEC. 916. RULES AND REGULATIONS.

The Commissioner shall, with the approval of the Secretary, prescribe such rules and regulations as may be deemed necessary to carry out the provisions of this title. (7 U. S. C. 658.)

Revenue Act of 1939, c. 247, 53 Stat. 862:

SEC. 405. FILING OF CLAIMS FOR REFUND OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Section 903 of the Revenue Act of 1936 (relating to expiration of time for filing claims for refund of amounts paid under the Agricultural Adjustment Act) is amended by striking out "July 1, 1937" and

inserting in lieu thereof "January 1, 1940." (7 U. S. C. 645.)

Treasury Regulations 96, promulgated under Title VII of the Revenue Act of 1936:

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable.*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

ART. 302. *Limitation as to number of claims.*—Only one claim shall be filed by any person for refund of floor stocks taxes. The claimant shall include in such claim the total amount of refund claimed with respect to the total amount of all floor stocks taxes paid by him.

If the claimant paid floor stocks tax with respect to more than one commodity, the total amount of refund claimed out of the total floor stocks taxes paid with respect to all commodities shall, nevertheless, be set forth in one claim. For example, if the claimant paid the cotton floor stocks tax, the wheat floor stocks tax, and the tobacco floor stocks tax, he shall include in one claim the total amount of the refund sought out of the total amount of floor stocks taxes paid by him with respect to cotton articles, wheat articles, and tobacco articles, and shall not file three separate claims.

ART. 305. *Facts and evidence respecting tax burden.*—If the claim involves floor stocks taxes paid with respect to more than one commodity, the facts and evidence as to the amount of tax burden borne with respect to articles made from each such commodity shall be set out separately; e. g., if the claim is for refund of amounts paid as cotton floor stocks tax and as wheat floor stocks tax, the facts and evidence concerning the tax burden with respect to cotton articles shall be set forth separately from the like facts and evidence with respect to wheat articles. (See article 202.)

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REPLY BRIEF FOR PETITIONER

THEODORE B. BENSON,
Counsel for Petitioner.

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REPLY BRIEF FOR THE PETITIONER

On page 7 of his brief in opposition the Solicitor General apparently questions the adequacy of the claim for refund. He says, "the claim was fatally defective," and for that reason there is no conflict with the decisions of this Court in *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, and *Anniston Manufacturing Company* v. *Davis*, 301 U. S. 337.

The petitioner is gratified to know that the *Jefferson Electric Company* and the *Anniston Manufacturing Company* cases are distinguishable for no other reason.

The claim for refund is, however, not "fatally defective" and the Solicitor General himself does not so contend in his statement of the question presented on page 2 of his brief. There, as in the plea in bar filed by the United States, he states the question as the right to sue, and he states, as